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Mr. A. Sands
Secretary
Australian Senate
Finance and Public Administration
References Committee
Parliament House
Canberra, ACT, 2600

21st August 2003

Dear Sir,

Re: Inquiry into administrative review of veteran and military compensation and income support.

We refer to the above mentioned Inquiry. This submission from National Legal Aid (NLA) to the Senate Finance and Public Administration References Committee is with regard to Term of Reference (e) of the Inquiry, ie;

The options and preferences for a revised system of administrative review within the area of veteran and military compensation and income support including:

(e) an assessment of the adequacy of non-means tested legal aid for veterans, the appropriateness of the current merits test and its administration, and options for more effective assistance to veteran and ex-service claimants by ex-service organisations and the legal industry.

NLA's response to TOR (e) may inform some of the other Inquiry's term of reference.

NLA has identified three elements to TOR (e) and addresses each of these as follows although notes the elements and NLA's responses thereto overlap:

1. Assessment of the adequacy of the non means tested legal aid for veterans:

Legal Aid Commissions receive money from the Commonwealth for a range of matters. One of those matters is legal assistance for veterans. Receipt of money from the Commonwealth by each Commission is contingent upon the Commission entering into a funding agreement with the Commonwealth.

Legal Aid Commissions are required by their respective funding agreements with the Commonwealth to apply the Commonwealth's Guidelines ("the Guidelines") to

applications for legal assistance for any Commonwealth matter, including legal assistance to veterans. Generally, the Guidelines require the Commissions to ascertain that an application for aid falls within the relevant guideline and also to apply a means test and a merit test (also contained within the Guidelines) to that application. The relevant guideline for War Veterans' Matters is Guideline 5.

War veterans' matters are different to applications generally because pursuant to Guideline 5 of the Guidelines "War Veterans' Matters, assistance for war veterans is not subject to the means test, and so Commissions do not means test applications received from veterans. A copy of Guideline 5 is attached. The merits test is referred to in more detail below.

The Guidelines are currently the subject of review by the Commonwealth Government and NLA has made a submission to that review including with regard to Guideline 5. Essentially the amendments requested by NLA were:

- That GL 5.1 be expanded to cover allowances under Part VI of the Veterans' Entitlement Act which include attendant carers' allowance, recreational transport allowance, the vehicle assistance scheme and temporary incapacity allowance.

This request was made on the basis that these allowances presuppose a high level of physical and psychiatric disability. The claimants are presently more than likely to be unrepresented at the Tribunal and find it very difficult to succeed. Many veterans under Pt II, who are eligible for aid for their disability pension are also seeking some of the allowances for which aid is not available.

- That GL 5.2(1) be amended to include provision for an additional stage of 4 hours to attend mediation.
- That GL 5.3 be redrafted to abolish the distinction between complex and non complex cases. Commissions would like to have greater flexibility to determine the level of resources available in veteran's matters.

One concern that some Commissions have is the limited number of practitioners who are prepared to do Veterans' Matters work. Legal aid work for veterans is paid at least as well as any other kind of legal aid work, however, the Committee will be aware that legally aided work is not highly paid. There is some evidence to suggest that one of the difficulties in attracting private practitioners to legal aid work generally is the fees paid for that work. Fees payable, the fact that work for veterans' matters is highly specialised, and what appears to be a general trend of static or decreasing applications across the country may be contributing to the limited number of practitioners prepared to do the work. In response to the limited numbers of practitioners prepared to do the work for veterans, Commissions have either inhouse practitioners or have actively encouraged more private practitioners to pick the work up. NLA has also been making representations to the Commonwealth about the need to increase resources to Commissions so as to enable an increase in fees generally. These representations have application to all matters, including to applications for legal assistance for Veterans' matters.

The appropriateness of the current merits test and its administration:

The Guidelines' merits test has 3 elements and the Commonwealth requires that this test be applied by Commissions to applications generally, including to veterans' matters. The 3 elements are:

- a) a test of the legal and factual merits, (ie reasonable prospects of success)
- b) the prudent self funding litigant test,
- c) the appropriateness of spending limited public funds.

Commissions are aware that legal assistance to veterans was once a separate program and that program then became incorporated into the activity of Legal Aid Commissions. Initially funding for Veterans' matters to Commissions was separately identified and open ended. This later changed with Commissions being required to administer Veterans' Matters out of the overall funding provided to Commissions by the Commonwealth, ie the Commonwealth ceased to specifically identify the funding for legal assistance to veterans.

All Commissions understand the history set out above and therefore tend to approach applications for legal assistance for war veterans' matters generously. From time to time an application of the merits test will require refusal. Refusal rates around the country are generally low and there are review processes in place in Commissions which applicants for aid, including veterans, can use to cause a review of any refusal of legal aid. NLA understands that the Attorney-General's Department will provide you with the statistics regarding applications for legal assistance to Legal Aid Commissions for Veterans' matters.

NLA is of the view that the current merits test (as distinct from the Guidelines) is appropriate and that it is properly administered.

Options for more effective assistance to veteran and ex-service claimants by ex-service organisations and the legal industry.

The provision of legal advice and independent medical reports early in the decision making process is likely to increase the chances of the decision maker at first instance finding in the veterans' favour. Cases that are better prepared in the earlier stages of a decision making process are more likely to lead to the correct decision being made and are less likely to go to review.

In light of the above NLA suggests that the most useful expansion of services to Veterans would be the provision of ongoing advice and assistance to veterans in all matters. This might require an ability for Legal Aid Commissions to give the cost of disbursements for medical reports. Advice and Assistance Services are currently offered by Commissions for all matters but this is on the basis of "one off" legal advice appointments or "legal advice clinics". These services are generally not means tested and are often preliminary to applications being made for grants of legal assistance pursuant to the guidelines. If these services could be provided to veterans on an ongoing basis in all veterans matters, NLA believes that the difficulties veterans

encounter in the decision making process could be reduced. Additional funding for this would be at comparatively low cost compared to the cost of a grant of aid. It may also obviate the need for many applications for legal assistance at a later stage as it would enable the provision of the relevant evidence to the decision maker at first instance and consequently that decision would be less likely to be subject to review.

In summary:

NLA believes that assistance to Veterans could be improved if

- the changes requested by NLA in its submission to the Commonwealth's Guidelines Review were made,
- the hourly rate payable for legal aid work by practitioners could be increased, and
- the suggestions made by NLA for more effective assistance to veterans, as set out above, were implemented.

NLA thanks you for the opportunity to make this submission. Should you require any further information please do not hesitate to contact Mr Norman Reaburn, Chairperson, NLA.

We look forward to confirmation of receipt of this submission.

Yours faithfully,

N.S.Reaburn
Chairperson,
National Legal Aid.

- (e) the appeal raises important or complex questions of law.

Guideline 3 Migration cases

3.1 Assistance for limited migration matters

- (1) Legal assistance may be granted for proceedings in the Federal Court or High Court dealing with a migration matter, including a refugee matter, only if:
 - (a) there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or
 - (b) the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.
- (2) Subclause (1) applies to a matter, even if the matter could also be characterised as falling within another Commonwealth priority or guideline.
- (3) In all other cases applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance.

Guideline 4 Equal opportunity and discrimination cases

4.1 Assistance for certain matters if substantial benefit

Legal assistance may be granted for equal opportunity or discrimination cases if there are strong prospects of substantial benefit being gained by the applicant and also by the public or a section of the public.

Guideline 5 War Veterans' matters

5.1 Purpose

- (1) To acknowledge the special contribution made by war veterans to protecting Australian society in time of war, assistance may be granted to war veterans or their dependants in relation to appeals from decisions of the Veterans' Review Board about war-caused disability pension entitlement or assessment claims under Part II of the *Veterans' Entitlements Act 1986*.
- (2) Assistance is not subject to the means test, nor any contribution except costs recovered in the matter.

5.2 Non-complex matters – stage of matter limits

- (1) Unless the Commission determines the matter to be complex, funding may be granted in the following stages:
 - stage 1* — funding for the following costs and disbursements only:
 - (a) a maximum of 10 hours for work up to and including the second preliminary conference (including all attempts to settle the matter); and
 - (b) up to 2 medical reports, if necessary.
 - stage 2* — funding for the following costs and disbursements only:

- (a) a maximum of 12 hours work for the hearing (including all preparation and either the costs of a solicitor or the fees of a barrister for appearing at the hearing); and
 - (b) witness expenses.
- (2) The total amount of funding that may be made available for disbursements for a non-complex matter is \$2,500.
- (3) Funding at each stage is subject to:
 - (a) merits assessment; and
 - (b) compliance with the Commonwealth's Checklist for Administration of War Veterans' Matters and the Administrative Appeal Tribunal's General Practice Direction.

5.3 Complex Matters

- (1) The Commission may determine the most appropriate assistance to provide for complex matters.
- (2) The Commission may determine that a matter is complex at any time during the administration of a matter.
- (3) In determining whether a matter is complex, the Commission may have regard to:
 - (a) whether several conditions are being claimed, and reports are required from 3 or more areas of medical expertise;
 - (b) whether there is a complex link between Statements of Principle and the condition claimed; and
 - (c) whether unresolved issues of law are involved.
- (4) In making its determination, the Commission may consult with:
 - (a) the applicant for assistance;
 - (b) the national office of the Department of Veterans' Affairs; and
 - (c) the Administrative Appeals Tribunal.

Guideline 6 Other Federal and High Court proceedings

6.1 Assistance for certain matters if substantial benefit

Subject to the other civil law guidelines, if the Commission considers that there are strong prospects that the applicant would gain a substantial benefit, legal assistance may be granted for:

- (a) appeals from decisions of the Administrative Appeals Tribunal;
- (b) original proceedings in the Federal Court, the Federal Magistrates Service and the High Court; and
- (c) appeals in the Full Court of the Federal Court and the High Court.